STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REV. EDWARD PINKNEY,

Defendant-Appellant.
_____/.

S Ct # _____

COA # 325856

Berrien County Trial Ct. # 2014001528-FH
2nd Judicial Circuit
Hon. Sterling R. Schrock – trial judge

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APPELLANT PINKNEY'S APPLICATION FOR LEAVE TO APPEAL

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Basis for Jurisdiction and Statement Identifying Opinion Appealed

The Court of Appeals issued its opinion in Appellant's appeal of right on July 26, 2016. Pinkney is appealing that judgment by filing this Application for leave within 56 days of that opinion. Jurisdiction in the Michigan Supreme Court is pursuant to MCR 7.305(C)(2). Jurisdiction in the lower courts was as follows.

Appellant-Defendant Pinkney was charged in the Berrien County Trial Court: (a) under MCL 167.937 with five (5) felony counts regarding forgery under the election code; and (b) under MCL 168.957 with six (6) misdemeanor counts of falsely certifying petitions for recall petitions. He was convicted of all of the felony charges and acquitted of all of the misdemeanor charges. After sentencing, judgment was signed and entered on December 15, 2014.

Pinkney filed a timely request for appointment of counsel and to proceed on appeal at public expense which was stamped by the trial court as received on January 26, 2015. On January 30, 2015, the trial court signed a Claim of Appeal and Order Appointing Counsel. Jurisdiction in the Court of Appeals was pursuant to MCR 7.204(2)(a).

Questions Presented

I. Whether there was insufficient evidence, under state law and the constitution, to convict Pinkney of forgery of recall petitions when:

(a) he did not have exclusive possession of the petitions;

(b) no one testified that they saw Pinkney forge the petitions;

(c) Pinkney did not confess to forging the petitions;

(d) the forensic handwriting examiner, from the Michigan State Police, indicated that he could not determine who made the changes to the petitions;

(e) the prosecution's own witnesses indicated that persons other than Pinkney circulated some of the petitions that were forged; and

(f) Pinkney's witnesses indicated another person forged the petitions and Pinkney had no knowledge that the documents were forged until these charges were brought?

The trial court answered this question "no."

The Court of Appeals answered this question "no."

Defendant Pinkney answers this question "yes."

II. Whether it was reversible error to instruct the jury on an aiding and abetting theory when there was no evidence, beyond conjecture, that Pinkney aided or abetted anyone in forging the recall petitions and never knew, prior to being charged herein, that the documents had been forged?

The trial court did not answer this question.

The Court of Appeals answered this question "no."

Defendant Pinkney answers this question "yes."

III. Whether it violated the Michigan Rules of Evidence and the Constitutional rights to Free Speech and Due Process for evidence of Pinkney's political and community activities to be admitted under MRE 404(b) based on the prosecution's allegations that because Pinkney was politically and socially motivated (as indicated by his political and social activity **that was 100% legal**) that it was likely that he committed the illegal act of forgery that promoted Pinkney's political goal of having the recall go forward? This question must be considered in the context of: (a) the fact that the prosecution admitted political and other First Amendment activity that was **not** the subject of the prosecution's notice of intent to introduce evidence under MRE 404(b); and (b) the fact that Pinkney's political and other First Amendment activity, that was not the subject of the notice, was unpopular with many people in the community and was not relevant to whether Pinkney committed forgery.

> The trial court answered this question "no" in relation to the evidence that it agreed could be admitted pursuant to the prosecution's MRE 404(b) notice, but did not clearly answer this question in relation to the evidence that was not the subject of the prosecution's notice or the trial court's written order.
>
> The Court of Appeals answered this question "no."
>
> Defendant Pinkney answers this question "yes."

IV. Whether trial counsel was ineffective for failing to object to the aiding and abetting instruction that is the subject of Argument II?

> The trial court did not answer this question, but a motion to remand was filed contemporaneously with Pinkney's brief in Court of Appeals.
>
> The Court of Appeals answered this question "no" and denied the motion to remand.
>
> Defendant Pinkney answers this question "yes."

V. Whether in relation to the only statute that was the basis of felony counts in the Information, MCL 168.937:

(a) MCL 186.937 only sets forth a penalty provision for forgeries that are prohibited by other sections of the election code and does not set forth a substantive crime that can be the basis of a prosecution;

(b) Due Process, the vagueness doctrine and the rule of lenity are violated if MCL 168.937 – which merely states forgeries are punishable by up to five (5) years and a fine – is deemed to be a statute which prohibits forgery of any and all documents related to an election; and

(c) there was no jurisdiction as the Information failed to state an offense that can be prosecuted when no charges were brought under any other section of the election code?

The trial court answered this question "no."

The Court of Appeals answered this question "no."

Defendant Pinkney answers this question "yes."

Reasons for Granting Leave

The Court of Appeals decision in this case is published and involves a very dangerous precedent for the people of the State of Michigan. The decision indicates that there is sufficient evidence to convict **under either** of the following circumstances when the defendant is very motivated in relation to an election and is very outspoken and active in political and social matters unrelated to the election:

> A. When the defendant had non-exclusive possession of election-related documents that contained forgeries; **or**
>
> B. When the defendant possessed the election documents after the documents were forged by an election worker – who was in the same camp as the defendant – but the defendant had no knowledge that the election worker forged the documents or even that the documents contained forgeries.

Surely this conviction cannot stand. It is worth repeating that this is a very dangerous precedent for everyone in the State of Michigan, especially persons who seek to engage in the political process. The Court of Appeals decision chills legitimate activity.

Also, the statutory construction of MCL 168.937 is an important issue presented by this case. The Court of Appeals indicated that the statute proscribes forgery of any and all election code documents. The issue was expressly left open in *People v Brandon Hall,* Mich SCt. slip op pg 2, n 2 (Mich. SCt # 150677, 6-29-16). Pinkney submits that this question should be conclusively decided by this Court at this point. Pinkney and Brandon Hall appear to be the only defendants who have presented the issue to the Michigan Court of Appeals. One judge of the Court of Appeals acknowledged at oral argument that the unpublished Court of Appeals decision in *Hall* appeared to be the only appellate opinion to address the issue. Pinkney's application thoroughly addresses this issue and presents an ideal vehicle for this Court to consider the matter.

Statement of Facts

Edward Pinkney was charged: (a) under MCL 167.937 with five (5) felony counts of forgery based on allegations that he altered dates next to signatures on petitions to recall Benton Harbor Mayor James Hightower; and (b) under MCL 168.957 with six (6) misdemeanor counts of falsely certifying petitions for the recall of Hightower by indicating that no person had signed the recall petitions more than once. After a jury trial, he was convicted of all the forgery counts and acquitted of all the misdemeanor charges.

After two days of jury selection, the prosecution presented evidence during just over three (3) days of trial. As summarized in more detail below, the prosecutor's case regarding the felony counts basically consisted of:

> (a) the general circumstances and procedures by which the language for the petition for the recall of Hightower was approved, along with the general procedural requirements for recall petitions;
>
> (b) testimony from petition circulators regarding their activities circulating petitions and which indicated Pinkney's political activism in relation to the recall and other political and social matters in Berrien County; the petitions circulated by these persons were not the subject of the charges herein;
>
> (c) testimony from Mark Goff, a forensic documents examiner from the Michigan State Police, who testified that it appeared dates were changed on some of the recall petitions but expressed no opinion as to who made the changes and specifically stated he could not state Pinkney made the changes; Goff provided this testimony in relation to the petitions that were the subject of the five (5) felony counts and which Pinkney certified as having circulated;
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> (d) testimony from persons who signed the petitions that were the subject of the misdemeanor and felony counts;
>
> (e) testimony from persons, including County Clerk Sharon Tyler and Hightower regarding Pinkney's political activity and Pinkney's opposition to certain politicians and the policies of a local company – Whirlpool; this evidence included matters that were controversial in the community and which were not directly related to the Hightower recall; it also included efforts to recall Tyler several times **after** the recall petitions herein were allegedly forged and turned

into the County Clerk's office – and even after the charges herein were brought against Pinkney; the prosecution claimed this evidence was admissible under MRE 404(b) to prove that Pinkney had a motive to forge the petitions to recall Hightower; Pinkney objected on state-law grounds under MRE 404(b) and under the First Amendment. It also included the prosecution's cross-examination of Pinkney regarding political and social activity far removed from the recall.

Pinkney presented his defense related to the forgery charges after the prosecution rested. Three (3) witnesses testified that, on January 7, 2014 another person, Venita Campbell, committed the forgery out of Pinkney's presence by changing the dates. One of the witnesses, Marquette Coates, indicated that Campbell brought the petitions to Coates' home on January 5th and left the petitions there until January 7th when Campbell came back and changed the dates. During these three (3) days, the petitions were not in the possession of Pinkney. All three witnesses testified that Campbell forged the petitions on January 7th, the day before the petitions were returned to the County Clerk and under circumstances indicating Pinkney had no knowledge of the forgeries. One of these witnesses, Quacy Roberts, took the petitions from Campbell on January 7th and delivered them to Pinkney on the morning of January 8, 2014 just before Pinkney took them to the County Clerk's office for filing. Roberts indicated that he did not tell Pinkney about the fact that the dates had been changed. Pinkney also testified that he received the petitions from Roberts and took them to the County Clerk's office without knowing that Campbell had changed the dates. A more detailed factual statement of the testimony with citations to the record is set forth below.

Testimony of Carolyn Toliver Regarding the Issuing and Return of the Recall Petitions

On the second day of the prosecution's case-in-chief, Carolyn Toliver testified. She is the election administrator for the Berrien County Clerk's office. Her testimony primarily related to: (a) the recall process in general; (b) the circumstances under which the language for the recall

petition was approved in this case; and (c) the circumstances regarding the return of the signed recall petitions to the County Clerk's office in this case. (TT IV, Toliver, 727-883)

In the latter part of 2013, James Cornelius presented her office with language for a petition to recall James Hightower, Benton Harbor's mayor. She took the petitions from him and gave him a receipt. Rev. Pinkney was with Cornelius when the language was submitted. (TT IV, Toliver, 750-758)

The language of the proposed petition was then subject to review to determine if it was sufficiently clear to allow the recall process to begin. The clarity hearing was held on November 6, 2013. The language was approved. After approval, Toliver sent Cornelius correspondence indicating the approval. (TT IV, Toliver, 759-760)

After the approval, the petition is good for 180 days. This time line runs from the date of the approval. (TT IV, Toliver, 734 & 761-762) The 180 days in this case ended on May 5, 2014.

However, when signatures are submitted to determine if there are the minimum number necessary to trigger a recall election, the only signatures that may be counted must have been obtained within a 60 day window. (TT IV, Toliver, 736-738) This 60 day window is important in that the allegations are that dates were changed to bring some of the signatures within the 60 day window.

In the case at bar, the petitions were turned in on January 8, 2014 after the County Clerk's office was closed on January 6th and 7th, a Monday and Tuesday, due to a polar vortex and snow emergency. (TT IV, Toliver, 828-829) With January 8th as the date triggering the 60 day period, signatures earlier than November 9th could not be counted. (TT IV, Toliver, 791 & 827-828) With November 6th being the date that an approval letter was sent out and presumptively not received until the next day, this left signatures collected on November 7th and 8th as being the

only signatures that could have been obtained prior to the 60 day window. (TT IV, Toliver, 827-828) Additional signatures could have been obtained up until May 5, 2014 (TT IV, Toliver, 760-761) – but with the 60 day window moving based on when the petitions were returned to the County Clerk's office.

Defendant Rev. Pinkney first attempted to turn in a stack of petitions on the morning of January 8th. Toliver told Rev. Pinkney she could not take the petitions from him due the fact that he was not the sponsor of the recall and that only Cornelius could turn them in. Cornelius and Rev. Pinkney then returned later. At that time, Toliver accepted petitions from Cornelius and issued him a receipt. (TT IV, Toliver, 766-769) Toliver did not know if all of the petitions in the stack submitted by Cornelius were in Pinkney's possession when Pinkney attempted to submit petitions earlier that morning. (TT IV, Toliver, 844-845) It should be noted that Pinkney signed off as circulator of 33 of the 62 petitions. (TT VI, Pinkney, 1630)

The County Clerk's office initially approved enough signatures for the recall election to go forward. (TT IV, Toliver, 786-788) However, Mayor Hightower pointed out date problems after this approval. (TT IV, Toliver, 793) After this point, the original petitions were turned over to Sergeant Zizkovsky of the Berrien County Sheriffs Department. (TT IV, Toliver, 793-794)[1] The recall election ultimately did not go forward. (TT IV, Toliver, 796)

The Prosecution's First Set of Witnesses – Persons Who Circulated Petitions

These persons circulated petitions other than the ones that were the subject of the forgery counts herein. (TT III, Bridget Gilmore, 476-501; TT III, Marjorie Carter, 505-522; TT III,

[1] Zizkovsky was the prosecution's last witness in its case-in-chief. He testified in relation to receiving the petitions and also with regard to seeing one or more of the petitions that was the subject of a felony count(s) on a local television news program that he saw on the internet. Still frames from that program were introduced that showed the petition(s) prior to the dates being altered. (VI, Zizkovsky, 1429-1469)

Mable Avant, 523-542; TT III, George Moon, 543-594; TT III, Mary Donald, 595-620; TT III, David Shaw, 622-631; Elza Williams, 633-643) The prosecution also presented the testimony of James Cornelius, who was the sponsor of the recall petition and a circulator. (TT III, James Cornelius, 651-677) All of these witnesses were presented on the first day of the prosecution's case-in-chief prior to any other witnesses.

None of these witnesses testified that Pinkney did anything illegal. It appears that the prosecution presented these witnesses to:

> (a) set forth the general background of the recall process in this matter;
>
> (b) to provide information regarding Pinkney's political activity and outspoken nature regarding matters that are controversial in the community – his opposition to certain politicians and the impact of a local company's (Whirlpool) policy on the community; and
>
> (c) in relation only to the testimony of James Cornelius, to present the circumstances regarding Cornelius submitting the language for the recall petition and regarding the return of the recall petitions to the county clerk's office.

Testimony of the Forensic Document Examiner From the Michigan State Police

Mark Goff from the Michigan State Police (MSP) testified on the second day of the prosecution's case-in-chief. He has been with the MSP for 15 years. He has been a forensic document examiner in Lansing for the last five (5) years. (TT IV, Goff, 885-886)

His testimony only indicated that he believed: (a) dates had been changed on the petitions that were the subject of the forgery counts; and (b) in relation to the numbers for each date, two different types of ink were used – indicating that there were original numbers made with one type of ink and changes made with a different type of ink. (TT IV, Goff, 907-927)

Goff had no opinion whatsoever as to whether Pinkney or anyone else made the changes. (TT IV Goff, 926-928 & 951) He did not compare Pinkney's handwriting to the writing on the

petitions. (TT IV, Goff, 947)

He also could not indicate how much time had lapsed, with respect to each date entry, between the point when a date was first entered on the petition and the point when a change was made. (Goff, 927-928) (indicating changes could have been minutes apart)

Prosecution's Witnesses Who Signed Petitions – Some Indicating Pinkney Did Not Have Exclusive Possession of the Petitions Which Pinkney Signed as Having Circulated

On October 28th and 29th of 2014, the prosecution presented 24 persons who indicated they signed petitions that were the subject of the charges herein. Pinkney certified that he circulated these petitions. At least five (5) times during the signing of these recall petitions, some one other than Pinkney presented the petitions for the voter's signature when Pinkney was not present – indicating that Pinkney did not have exclusive possession of the petitions. (TT V, Anthony Cornelius, 1015-1021) (his brother gave him one recall petition to sign and Trudy Moore presented him with another recall petition that he signed without Pinkney being present either time); (TT V, Michael Roberts, 1107-1119) (female presented all the petitions he signed; never was a male present); (TT V, Antonio Sherman, 1148) (female asked him to sign; Pinkney was not present); (TT V, Ella Johnson, 1214) (Pinkney not there when she signed petition) Two other witnesses either could not identify the person who presented the petition as being present in the courtroom or could not remember if Pinkney presented the petition. (TT V, Roshanda Scott, 1309-1314); (TT IV, Cyril Pulliam, 985) Also, some of these 24 witnesses indicated they made changes to the date when they signed the petitions after initially entering the wrong date. (TT V, Rand, 1102); (TT V, E. Johnson, 1215-1216); (TT V, Lewis, 1225); see also, (TT V, Adams, 1242) (indicating, in the presence of Adams, that E. Johnson changed the date next to E. Johnson's signature) (TT V, Morris, 1076) (may have corrected date, but could not remember)

The Defendant's Witnesses Indicated That Another Person Altered the Petitions Without Pinkney's Knowledge and During a Period When Pinkney Did Not Possess the Petitions

The defense presented its case on October 30, 2014. Three defense witnesses testified that Venita Campbell altered the dates on the petitions at the residence of Marquette Coates while Pinkney was not present. (TT VI, Marquette Coates, 1505-1524; TT VI, Tammy Jude, 1532-1551; TT VI, Quacy Roberts, 1553-1588) All three witnessed testified that one of those witnesses, Quacy Roberts, took the petitions from Campbell. (TT VI, Coates, 1507; TT VI, Jude, 1533-1534; TT VI, Roberts, 1555-1558) The next morning on January 8, 2014, Roberts delivered them to Pinkney without indicating to Pinkney that the dates had been changed. (TT VI, Roberts, 1558-1560)

Pinkney testified that he received the petitions from Roberts on the morning of January 8th, took the petitions to the clerk's office that same morning and was present when James Cornelius filed them. Pinkney never had knowledge that the petitions were altered prior to the government notifying him of the alterations. (TT VI, Pinkney, 1594-1595 & 1601)

Pinkney testified that Campbell was active in the recall effort and drafted the language for the recall petition. (TT VI, Pinkney, 1595-1601) After the felony charges were brought due to alterations of the dates, she could no longer be located in the community. The defense could not locate her in order to produce her for trial. Prior to the charges against Pinkney herein, it was relatively easy to locate her in the community. (TT VI, Pinkney, 1607-1610)

Venita Campbell was listed on the defendant's witness list filed with the trial court on July 14, 2014, well in advance of trial. (TT VII, Zizkovsky, 1681) A witness presented by the prosecutor also referenced Venita Campbell on the first day of the prosecution's case-in-chief. (TT III, Elza Williams, 642-643)

The Prosecution's Rebuttal

On October 31, 2014, the prosecution presented two witnesses who had previously testified, Toliver and Zizkovsky. They indicated that, on October 30th or 31st, they ran the name "Venita Campbell" through databases and indicated they found persons as follows.

Toliver ran the name through a state-wide voter registration database for the State of Michigan. Toliver indicated that this search produced two people with this name. One was born in 1970 and was registered to vote in Detroit. The other was born in 1938 and was registered to vote in Flint. (VII, Toliver, 1667-1668)

Zizkovsky ran the name through a database for Michigan Drivers Licenses and identification cards. (VII, Zizkovsky, 1677) He also ran the name through: (a) TransUnion, a company that maintains credit records; (b) an online White Pages website; (c) "Been Verified," another online website available to the public; and (c) Facebook. He found some persons with the name Venita Campbell who lived out-of-state but could not recall finding any who were in their late 20s. (VII, Campbell, 1677-1678) Pinkney had previously estimated Campbell's age as "probably in her late twenties." (VI, Pinkney, 1608)

It appears that these two witnesses did not run all spelling variations of the name "Venita" through all of those databases. (See VII, Zizkovsky, 1682-1685) Also, Zizkovsky did not find, in the databases for State of Michigan drivers licenses and State of Michigan identification cards, the two persons Toliver found in the Michigan Voter Registration database. (VII, Zizkovsky, 1677). Zizkovsky found one person with that name in Detroit in the various database searches. (VII, Zizkovsky, 1684-1685)

Also, these witnesses did not run the name "Venita Campbell" through the databases of the State of Indiana or any other state. Berrien County borders Indiana and Lake Michigan in the

southwest corner of Michigan.

Testimony Regarding the Political Activity of Pinkney and His Speaking Out on Various Matters in Various Forums

A. James Hightower — the Mayor Who Was the Subject of the Recall Petition

Hightower testified that he learned that the petition for his recall was based on his vote of "no" on a proposal to impose an income tax on residents and workers of Benton Harbor. (TT III, Hightower, 684-688) Hightower knew different people, including Pinkney, were pushing for his recall based on Hightower's position on the tax issue. Pinkney was active in advocating Pinkney's position on the tax issue and for Hightower's recall at city commission meetings. (TT III, Hightower, 689-690) Others, including George Moon (who had previously testified) and city commissioners Muhammed and Bowen, also advocated in favor of imposing the tax. (TT III, Hightower, 691-692) Over objection, the prosecutor indicated that he was personally "convinced" regarding Hightower's position on the tax issue. (TT III, Hightower, 688)

Pinkney was also active in the Black Autonomy Network Community Organization (BANCO) and is the president of the local chapter. (E.g., TT III, Donald, 601-602; TT III, James Cornelius, 655-657; VI, Pinkney, 1610-1611) BANCO is an organization that is often critical of some local officials and big-business interests, including those of the Whirlpool Corporation. Hightower specifically indicated that Pinkney has been critical of Whirlpool. (TT III, Hightower, 700-701) Hightower believed BANCO was negative for the community. (TT III, Hightower, 691) Hightower also indicated the "crux of" the tax matter involved obtaining money from Whirlpool. (TT III, Hightower, 700-701)

Hightower also indicated that Pinkney contacted Hightower's employer in relation to the recall and thought the dispute was not just political, but personal. (TT III, Hightower, 696-699)

B. Sharon Tyler — the Berrien County Clerk

Sharon Tyler, the Berrien County Clerk, testified on the fourth and last day of the prosecutor's case-in-chief. (TT IV, 1399-1409) She testified that Pinkney filed twelve (12) applications to obtain petitions to recall Tyler **after** the recall petitions for James Hightower were submitted to the County Clerk's office. The applications to recall Tyler were filed between **August 19th and October 2nd of 2014**. (TT VI, Tyler, 1406 & 1409) **These recall efforts against Tyler occurred long after criminal charges were brought against Pinkney.** (See, e.g, Trial Court Register of Actions indicating Pinkney's arraignment on **April 25, 2014**) All of the recall applications against Tyler were "somehow related to the recall petition drive against Mayor Hightower." (TT VI, Tyler, 1408)

C. Various Other Witnesses

Other witnesses presented by the prosecution testified that Pinkney was very politically active and was vigorous in expressing his views regarding political matters and policy matters impacting the community. A good deal of this involved testimony concerning Hightower, BANCO and Whirlpool. (TT III, Gilmore, 499-500) (Pinkney spoke out against Hightower at city commission meetings and in public places); (TT III, Avant, 528-531) (Pinkney led Banco meeting where people advocated recall); (TT III, Moon, 576) (Moon responds affirmatively when prosecutor asks if Pinkney "discussed Whirlpool being . . . a controlling negative factor" – with court overruling First Amendment objection); (TT III, Moon, 585-586) (Pinkney speaks out against Whirlpool on the street, at City Hall); (Moon, id, at 589-590) (Pinkney speaks out the most regarding "anti-Whirlpool" and "anti-Hightower"); (TT III, Donald, 609) (no one advocated for recall more than Pinkney); (TT V, Adams, 1234-1235 & 1239) (questions and answers about extent and nature of Pinkney's advocacy)

The prosecution also asked at least one witness in its case-in-chief whether Pinkney participates in a radio program. (TT III, Moon, 585) (prosecution asking about radio show) The prosecution also asked Pinkney about this radio show. (TT VI, Pinkney, 1616) The radio show, "Pinkney to Pinkney," presents political and social views on a wide variety of subjects that are not related to the recall of Hightower, with views considered controversial within the community.

D. Cross-Examination of Pinkney Regarding His Advocacy

The prosecution cross-examined Pinkney about the fact that: (a) he "attends public meetings and speak[s] out" on various issues; (b) he was a leader in opposing a local development for the Harbor Shores project, which included a senior PGA golf course; (c) he speaks out against Whirlpool; (d) Pinkney is invited to various speaking engagements around the country; (f) nobody "in this community does as much as [Pinkney does] in regards" to the aforementioned issues; (g) "part of [his] search for justice and equality is leading recall efforts"; (h) he was also a leader in the effort to recall school board members; and (I) he has been on the Internet radio program of Pete Santilli. (VI, Pinkney, 1616-1618 & 1620)

The prosecution also asked questions that suggested Pinkney was involved with Ed Billings of Colorado who produces political cartoons that relate to issues regarding various places in the country, including Benton Harbor. Pinkney's counsel objected on grounds of the First and Fourteenth Amendments – but the objections were overruled. Thereafter, the prosecution questioned Pinkney about a proposed exhibit, a cartoon found on BANCO's website, that was never entered into evidence. The court stopped the questioning at that point. (TT VI, Pinkney, 1620-1625)

Pinkney was also cross-examined by the prosecution as to criticism of local institutions and judges on BANCO's website. (TT VI, Pinkney, 1610-1612) This included the prosecution's

questions as to whether Pinkney was the president of BANCO and whether:

(a) BANCO's website includes "a great deal of criticism of local institutions"; and

(b) BANCO produces T-shirts with the names of local judges and the statement "crimes against humanity."

The defense attorney objected to this cross-examination based on constitutional and state-law grounds. (TT VI, Pinkney, 1612-1615) While the trial court sustained the objection, the prosecution indicated it was relevant because "there are a number of matters this defendant is involved in that creates – that – that makes him to be the only one in this community that is that involved." (VI, Pinkney, 1615)

On redirect examination, Pinkney acknowledged that his positions are disliked by many people in the community, while others favor his positions. He insisted he did not alter the dates on the petitions. (TT VII, Pinkney, 1646-1647)

Argument

I. There Was Constitutionally Insufficient Evidence to Support Verdicts of Guilty on the Basis of Pinkney Being the Principal or an Aider and Abettor.

Standard of Review and Preservation of the Issue: Whether there is sufficient evidence to support a conviction is a constitutional issue that is reviewed *de novo. Jackson v Virginia,* 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 (1979); *People v Wolfe,* 440 Mich 508, 489 NW2d 748 (1992). The appropriate standard of review for sufficiency of evidence is whether, when viewed in a light most favorable to the prosecution, the evidence is sufficient to support a finding by a rational jury of guilt beyond a reasonable doubt. 443 US at 318; 440 Mich at 515. The court must apply this standard based upon all of the evidence up to the point when the motion is made. *E.g., People v Hampton,* 407 Mich 354, 368; 285 NW 2d 284 (1979) (citations omitted)

Pinkney moved for a directed verdict in the trial court on three (3) occasions – at the close of the prosecution's case, immediately after closing arguments and in a written motion after the jury verdict. (TT VI, Motion for Directed Verdict, 1487-1493; TT VII, Renewal of Motion for Directed Verdict, 1785-1787; Motion for Directed Verdict filed on 12-10-14) However, these motions were not necessary to preserve the issue. Sufficiency of the evidence arguments are preserved for purposes of appeal without any motions for directed verdict in the trial court. *Wolfe,* 440 Mich at 516 n6 (directed verdict motion not necessary to preserve question of sufficiency of evidence to support verdict; issue may be raised for first time on appeal); *People v. Cain*, 238 Mich App 95, 116-17, 605 NW2d 28 (1999) ("Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence.") citing *People v. Lyles,* 148 Mich App 583, 594, 385 NW2d 676 (1986); *People v Patterson,* 428 Mich 502, 410 NW2d 733 (1987).

Argument: This issue involves the sufficiency of the evidence under the beyond a reasonable doubt standard. In order to support a finding of guilt under the beyond a reasonable doubt standard, the prosecution is required to meet a much higher standard of proof than the standard applicable to a bind over based on probable cause (which was litigated in this case prior to trial). The much more stringent nature involved with the beyond a reasonable doubt standard was made very clear in *People v Justice,* 454 Mich 334, 344; 562 NW2d 652 (1997) quoting *Coleman v Burnett,* 155 US App DC 302, 316-317; 477 F2d 1187 (1973) (emphasis in bold added) (italicized emphasis added by the Michigan Supreme Court in the *Justice* opinion) where it was stated:

> It is the contrast of probable cause and proof beyond a reasonable doubt that inevitably makes for examinatorial differences between the preliminary hearing and the trial. Probable cause signifies evidence sufficient to cause a person of

> ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Proof beyond a reasonable doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. **The gap between these two concepts is broad.** *A magistrate may become satisfied about probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations.* By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause. [155 U.S. App. D.C. at 316-317, 477 F.2d at 1202 (emphasis added).]

Under the circumstances of this case, there was insufficient evidence for the jury to convict Pinkney. He is now entitled, as a matter of constitutional law, to a directed verdict.

The circumstances involved in this case raise, at most, a suspicion that Pinkney could have been involved with or knew the name of the person who changed the dates. This is far from the amount of evidence that was necessary for a finding, beyond a reasonable doubt, that Pinkney forged the documents by changing the dates or that he aided and abetted another person who changed the dates. His possession of the petitions, at points during the recall campaign effort, was not nearly enough to allow for a conviction.

Michigan case law indicates that the possession of evidence of a crime is not enough, without a good deal more, to allow a finding beyond a reasonable doubt that the possessor committed the crime or was an aider and abettor. This is true even when the possession is soon after commission of the crime. *People v McDonald,* 163 Mich 552; 128 NW 737 (1910) (where items that were presumed to be stolen were about two feet from defendants when they were arrested near the time of the commission of a burglary, "the possession of [the] stolen property, standing alone, [was] not even *prima facie* evidence that the person in whose possession it was found committed the burglary.") (citations omitted) (emphasis in original). This is particularly true when, viewing the evidence in the light most favorable to the prosecution, the date and

place of the crime is unknown and the defendant cannot be placed at the scene of the crime. *People v Rankin,* 52 Mich App 130, 135; 216 NW2d 620 (1974) (possession of stolen goods insufficient to allow for a conviction for breaking and entering with intent to commit larceny when "taking the prosecution's evidence as a whole and construing it most favorably toward the prosecution, we find the record barren of any evidence which would place the defendant at the scene of the crime charged herein."). If a persons's possession of a recently stolen item is insufficient to allow for a finding that the person stole the item, a person's possession of a forged document must also be insufficient for a finding that the person forged the document or aided and abetted the forgery – especially if the defendant cannot be placed at the scene of the forgery.

Also, courts from other jurisdictions have made it very clear that a defendant's possession of a forged document, **even under circumstances far more suspicious than the circumstances herein,** is insufficient to prove the defendant was the person who forged the document – or even that defendant had knowledge that the document was forged.[2] *Sneed v Smith,* 670 F2d 1348, 1352-53 (4th Cir 1982) (evidence was constitutionally insufficient to show defendant forged a check when checkbooks were stolen from a room in which defendant was present and defendant drove another person to a market and gave her a forged check taken from one of the stolen checkbooks, which she presented at the market); *State v Tomlinson,* 457 So 2d 651 (La SCt 1984) (where defendant deposited checks, with forged endorsements, into his account – but handwriting analysis could not determine who forged signatures – the possession and depositing of the checks was insufficient to prove that defendant forged the signatures or had knowledge

[2] While these cases are obviously not binding, this Court may utilize them as persuasive authority. *People v Jackson,* 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). Pinkney's counsel could find no Michigan cases regarding the circumstances under which possession of a forged document will allow for a finding, beyond a reasonable doubt, that the defendant forged the document or aided and abetted in a forgery.

that they were forged); *State v Ravenna,* 151 Vt 96; 557 A2d 484 (Vt SCt 1988) (defendant's possession of forged checks and other misconduct in relation to the checks was insufficient to prove that the defendant knew the checks were forged); *Heath v State,* 382 So 2d 391 (Fla App 1980) (insufficient evidence that defendant knew check was forged where Mr. Arini's blank checks were stolen from Arini and one was forged as being payable to defendant where there was no handwriting analysis of forgery and defendant requested a third party to cash the check; defendant testified that he was given a ride while hitchhiking by a man who claimed to be Mr. Arini and that man gave him the check in exchange for defendant's tent); *People v. Miller,* 144 AD 2d 94, 98; 537 NYS 2d 318 (NY App Div 1989) (defendant's possession of and attempt to cash forged check insufficient to show defendant's knowledge that it was forged); *Reid v Warden,* 708 F Supp 730, 731 & 738 (WD NC 1989) (without the use of an unconstitutional presumption, evidence was insufficient to prove defendant forged a check where the government's case consisted of the defendant "and his girlfriend proceed[ing] to a Sherwin Williams paint store, where [the defendant] purchased with a forged check several gallons of paint [and after] making the purchase at one paint store, [the defendant] and his girlfriend attempted three times to return the paint for a cash refund to paint stores other than the paint store from which [the defendant] had purchased the paint" and where the defendant testified to circumstances indicating someone else forged the check); *Ramsey v State,* 547 SW2d 29 (Tex Crim App 2014) (defendant's access to blank checks and defendant's cashing one of those checks that was forged check and made out to defendant was insufficient to prove that defendant forged the check when there was no evidence that the handwriting for the forgery belonged to the defendant and others also had access to the blank checks); *Stuebgen v State,* 547 SW 2d 29 (Tex Crim App 1977) (evidence insufficient to show defendant knew check was forged where the

defendant had access to blank check that was forged and cashed that forged check which was made out to the defendant as payee but there was no evidence that the defendant's handwriting appeared on the face of the check and there was no statement by defendant indicating he knew the check was forged; defendant also did not misrepresent his identity when cashing the check); *Crittenden v State,* 671 SW2d 527, 528 (Tex Crim App 1984) (evidence insufficient to know check was forged under circumstances similar to those in *Stuebgen, supra*); *Pfleging v State,* 572 SW2d 517 (Tex Crim App 1978) (insufficient evidence to know check was forged where defendant presented a stolen and forged $3,500 check for payment and requested $2,000 in cash and $1,500 to be applied to a credit card that the issuing bank had a "pick up" on); *Taylor v State,* 626 SW2d 543 (Tex Crim App 1981) (insufficient evidence to prove defendant committed the forgery where defendant attempted to pass one dollar bills that had been altered to appear to be five dollar bills).

Pinkney is entitled to a directed verdict. The evidence presented at trial herein did not place Pinkney at scene of the crime when the petitions were forged. The prosecution presented no evidence that Pinkney was the only person with access to the petitions – and in fact presented evidence that other persons circulated petitions that Pinkney certified as having circulated. The defense presented evidence that others had access and, in fact, another person altered the dates on the petitions. Beyond Pinkney's non-exclusive possession, the prosecution attempted to link Pinkney as the person altering the dates, or perhaps under an aiding and abetting theory, based primarily on Pinkney's activity in exercising his constitutional rights in relation to elections, the political process and community activities – both before and after the recall petitions were submitted to the county clerk. Pinkney's conviction must be reversed based on: (a) the United Stated and Michigan constitutions; (b) Michigan law regarding insufficiency of proof, under the

beyond a reasonable doubt standard, related to possession of stolen items; and (c) persuasive authority from other jurisdictions related to the insufficiency of evidence based on possession and cashing of forged checks.

Also, the conviction can be supported on an aiding and abetting theory. The evidence showed that Pinkney was involved with this recall effort and that he was associated with many people involved with this recall effort. Even if the evidence had indicated Pinkney was present when someone else changed the dates (and there was no evidence of this), this alone would have been insufficient evidence to support a conviction. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris,* 236 Mich App 411, 419-420; 600 NW2d 658 (1999) citing *People v Wilson,* 196 Mich App 604, 614; 493 NW2d 471 (1992); *accord, People v Burrel,* 253 Mich 321, 323; 235 NW 170 (1931) (quoting 1 Cyc Crim Law (Brill) § 233) ("Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent.").

The Sixth Circuit has granted habeas relief on this basis – for constitutionally insufficient evidence to support the verdict – many times as indicated in *Newman v Metrish,* 543 F3d 793, 796-797 (6th Cir 2008) (emphasis added) cert denied 130 S Ct 1134 (2010):

> **Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence.** See, eg, *Parker v Renico,* 506 F3d 444, 452 (6th Cir 2007) (evidence that Parker was in a car containing guns with men who planned a murder was too speculative to support a finding that Parker constructively possessed the firearm); *Brown v Palmer,* 441 F3d 347, 352 (6th Cir 2006) (finding evidence that Brown was present at the scene and had some acquaintance with the perpetrator

> insufficient to support a conviction of armed robbery and car-jacking under an aiding and abetting theory); *Fuller v Anderson,* 662 F2d 420, 423-24 (6th Cir. 1981) (verdict for felony murder not supported by evidence showing only that Fuller was present at the scene of the arson where evidence did not establish beyond a reasonable doubt that Fuller consciously acted to aid in the arson); *Hopson v Foltz,* No. 86-1155, 818 F2d 866, 1987 US App LEXIS 6596, at *5 (6th Cir May 20, 1987) (evidence insufficient to support conviction of second-degree murder on theory of aiding and abetting where there was no proof "that Hopson acted in pre-concert with [the shooter] to commit the murder or that he said or did anything to support, encourage, or incite the commission of the crime.").

It should also be noted that Pinkney could not be convicted as an aider and abettor on the theory that he assisted the person who changed the dates at some point after the dates were changed – even if it could be proved that Pinkney knew the documents had been forged. As stated in *Davis v. Lafler,* 658 F.3d 525 (6th Cir. 2011) (Moore, dissenting) (emphasis added), this cannot be the proper basis of an aiding and abetting conviction:

> [U]nder Michigan law, "[a] person cannot be convicted as an aider and abettor on the basis that he was an accessory after the fact." *Hopson v Foltz,* No. 86-1155, 818 F2d 866 (table), 1987 WL 37432, at *2 (6th Cir May 20, 1987) (citing *People v Lucas,* 402 Mich 302, 262 NW2d 662, 662-63 (Mich 1978)). **Aiding and abetting of the crime must occur before or during the commission of the crime.** *People v Smith,* Nos. 204474, 204476, 1999 Mich App LEXIS 512, 1999 WL 33453995, at *8 (Mich Ct App. Mar 12, 1999).

In conclusion, there was insufficient evidence to convict Pinkney under either a theory of Pinkney being the principal offender or as an aider and abettor. Pinkney is entitled to a directed verdict of acquittal. The Michigan Supreme Court should decide this issue even if it finds some other error requires reversal. This is due to the fact that Double Jeopardy prevents a retrial when the evidence was constitutionally insufficient to convict. *Eg, United States v Quinn,* 901 F2d 522, 529 & n 5 (6th Cir 1990) citing *Burks v United States,* 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1, 12-13 (1978) (other citations omitted).

II. Aiding and Abetting Theory – There was Insufficient Evidence to Allow Guilty Verdicts on an Aiding and Abetting Theory. Giving the Jury an Instruction That Allowed the Jury to Convict Pinkney Either as the Principal or under an Aiding and Abetting Theory Was Reversible Error.

Standard of Review and Preservation of Issue: Prior to the jury verdict, defense counsel moved for a directed verdict on all five (5) forgery counts. He argued that there was no evidence that Pinkney committed the crimes charged in those counts. (TT VI, Motion for Directed Verdict, 1487-1493) While counsel did not specify a distinction between criminal liability as principal or aider and abetter, it is clear that counsel indicated there could be no criminal liability as either a principal or as an aider and abettor.

However, no specific request to omit an aiding and abetting instruction was made. If the issue is not preserved, the plain error standard is applicable. *People v Carines,* 460 Mich 750, 597 NW2d 130 (1999). In order for there to be plain error: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id* at 763 citing *United States v Olano,* 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

As indicated in a separate argument, *infra* at pp 41-43, it constituted ineffective assistance of counsel in violation of the constitution not to request appropriate jury instructions related to this issue and preserve it. Ineffective assistance of counsel, for failure to raise the issue, constitutes "cause" and "prejudice," allowing the court to reach the merits of the underlying claim. *E.g., Franklin v. Anderson*, 434 F.3d 412, 418 (6th Cir. 2006).

Argument

An aiding and abetting instruction was given in Volume VII of the trial transcript at pp 1764-1765. In order for the trial court to submit a case to the jury on an aiding and abetting theory, there must be constitutionally sufficient evidence that a person other than the defendant

committed the crime as principal and that the defendant aided and abetted that person. *People v Parks,* 57 Mich App 738, 742-745; 226 NW2d 710 (1975). When there is insufficient evidence to allow the charge to be submitted to the jury on an aiding and abetting theory, the trial court commits reversible error by giving an aiding and abetting instruction to the jury along with an instruction that indicates the jury may convict the defendant as the principal. *Parks,* 57 Mich App at 743 & 745; *People v Smielewski,* 235 Mich App 196, 206; 596 NW2d 636 (1999) (reversal is not required based on submission to the jury on both theories of defendant's liability as a principal and as an aider and abetter **unless** the evidence is insufficient to support a verdict of guilty as to one of the theories) interpreting *People v Olsson,* 56 Mich App 500; 224 NW2d 691 (1974). Mere suspicion that another person was a principal and that the defendant may have aided and abetted such person is insufficient to allow an aiding and abetting charge to be submitted to the jury. *People v Mackey,* 121 Mich App 748, 759-760; 329 NW2d 476 (1982).

These propositions were also clearly set forth in *People v Tolbert,* 77 Mich App 162, 167; 258 NW2d 176 (1977) (emphasis in original) where it was stated:

> Although conviction of the principal is no longer necessary to charge an accessory, an aiding and abetting instruction may not be given absent proof of the ***guilt*** of the principal. *People v Akerley,* 73 Mich App 321, 326; 251 NW2d 309, 311 (1977), *People v Laine,* 31 Mich App 271, 272; 187 NW2d 505, 506 (1971), lv den, 385 Mich 752 (1971). To prove an accused's guilt as an aider and abettor, it must be shown that the defendant either shared the criminal intent of the principal or aided and abetted knowing that the principal had the requisite criminal intent. *People v Spry,* 74 Mich App 584; 254 NW2d 782 (1977), *People v Penn,* 70 Mich App 638, 649; 247 NW2d 575, 581 (1976). "Notwithstanding the accused aider's intent, such proof is a logical impossibility if proof of the ***actor's*** criminal intent is lacking." (Emphasis supplied.) *People v Akerley,* supra, 326.

In *Parks, supra,* the evidence was insufficient to find that another person was involved as a principal in a burglary when an unknown person accompanied the defendant when the defendant cashed a forged checked taken from the burglary. There were also unidentified

fingerprints at the scene of the burglary. An aiding and abetting instruction under these circumstances required reversal.

In *Tolbert, supra,* there was insufficient evidence that two women possessed heroin with the intent to deliver it when those two women attempted to flush the heroin down the toilet when the police arrived. The defendant could not be convicted on the theory of aiding and abetting others (the two women) in the possession of heroin with intent to deliver. Although there was sufficient evidence to convict the defendant as the principal, reversal was required because the jury was given the aiding and abetting instruction. *Tolbert,* 77 Mich App at 167-168.

In the case at bar, there was insufficient evidence that the defendant aided or abetted a principal who was shown to have committed a criminal act with criminal intent. There was evidence that Pinkney assisted Cornelius in returning petitions to the clerk's office. However, there was insufficient proof to allow the jury to find beyond a reasonable doubt, or any standard of proof, that Cornelius was guilty as a principal. There was also no evidence that Pinkney aid Campbell in her forgery of the petitions, or that he even knew the petitions had been forged.

Again, there was insufficient evidence to convict Pinkney as a principal or as an aider and abetter. See Argument I, *supra.* Pinkney is entitled to a directed verdict as to all of the forgery counts. Alternatively, reversal is required – even if the court finds there had been sufficient evidence for a conviction as the principal – because the trial court instructed the jury on an aiding and abetting theory when there was insufficient evidence to convict on this basis.

III. The Prosecution Violated the Michigan Rules of Evidence, the First Amendment and Due Process by Introducing Evidence of Pinkney's Speech, Political Activity and Community Activity.

At trial the prosecution elicited "other acts" evidence regarding matters that were unrelated to whether Pinkney forged the documents in question or allowed people to sign

petitions more than once. The improperly admitted evidence included:

A. Sharon Tyler's testimony that Pinkney was involved with twelve (12) recall efforts against her **after** all of the petitions against Hightower were turned in and **even after Pinkney was criminally charged herein** (see Statement of Facts, pg 11);

B. Mayor Hightower's testimony regarding Pinkney's involvement with BANCO, anti-Whirlpool activity and political and community affairs not directly related to the effort to recall Hightower (see Statement of Facts, pg 10);

C. Testimony from various prosecution witnesses that Pinkney spoke on numerous occasions regarding the tax issue and against Whirlpool and was involved in BANCO and many community and political matters (see Statement of Facts, pp 11-12); and

D. During the cross-examination of Pinkney, that Pinkney was involved in numerous matters that had nothing to do with the recall of Hightower. These matters are specified at pp 12-13 of the Statement of Facts and included such far-ranging things as whether Pinkney spoke at events across the country and brought well-known individuals to Berrien County in support of some of BANCO's community and political positions.

Notice under MRE 404(b)(2) — On September 29, 2014, the prosecution submitted a Second Amended Notice to Introduce Other Acts Evidence Under MRE 404(b). At pages two (2) to three (3) of the notice, it indicated that the other acts evidence was admissible under MRE 404(b) based on motive. The notice stated, in part, that:

(a) The motive in this case is someone's desire to recall Mayor James

> Hightower and in order to accomplish that proceeded to change the dates of signers' signatures so as to include those signatures in the 60 day window of qualification; and
>
> (b) The purpose of this notice is to introduce **evidence of other political activity both before and after the dates of this offense in the Berrien County community** further indicating defendant's motive to change dates and collect double signatures. (emphasis added)

The notice listed three (3) witnesses and indicated they were "aware of the defendant's **political activism** in this county." *Id* at pg 3 (emphasis added) The witnesses were: (a) Carolyn Toliver; (b) James Hightower; and (c) Sharon Tyler. The notice went on to say, on pg 3, the witnesses were aware of Pinkney's "activism" and Pinkney's other recall efforts, including the effort to recall Tyler **which occurred** after Pinkney charged herein, along with Pinkney' s interest in having Hightower recalled. The "WHEREFORE" clause also specifically indicated that the prosecution was seeking to introduce the testimony of these three witnesses "as it may relate to of defendant's political activism." *Id* at pg 4.

The notice did not indicate that the prosecution would seek to admit evidence of Pinkney's various community and political activities – that was completely unrelated to the recall of Hightower – which the prosecution brought out on cross-examination of Pinkney.

On October 20, 2014, the court addressed the "other acts" testimony that was the subject of the second amended notice. In arguing the issue, the prosecution referenced the fact that everyone knows Pinkney had been involved in various political and community activities for "the last decade and half or so." (Status Conf of 10-20-14, at 8-9) The prosecution specifically indicated that none of these activities were "bad acts" but were "other acts." (Status Conf of 10-20-14, at 9)

The court addressed the issues on the record at the hearing. In an order entered on

October 27, 2014, the court indicated, in pertinent part, that:

> A. Hightower would be allowed to testify to Pinkney's "participation in the effort to recall Hightower," to Pinkney's "participation in public comments relative to anti-Hightower and a Hightower-Whirlpool alliance" and Pinkney's "participation in advocating for a 'yes' vote on the city income tax issue";
>
> B. Tyler would be allowed to testify to Pinkney's "participation relating to recall efforts of her due to her function as clerk in the Hightower recall process"; and
>
> C. Circulators would be allowed to testify to Pinkney's participation in the recall of Hightower and in "anti-Hightower and Hightower-Whirlpool alliance."

Preservation of Issue and Standards of Review: On October 13, 2014, Pinkney filed a nine (9) page document containing objections to the 404(b) evidence that was the subject of the prosecution's Second Amended Notice. Pinkney asserted the evidence was inadmissible under MRE 404(b) and the First Amendment. Pinkney specifically indicated that his political views are not popular with some people in the community and that introduction of this evidence had great potential to unfairly prejudice him in eyes of some jurors. Among other things, he also indicated: (a) it was not proper "motive" evidence under MRE 404(b) as defined by Michigan case law; and (b) it was actually propensity evidence – to show that Pinkney acted in conformity with his political views.

Also, defense counsel objected at the October 20, 2014 hearing and during the trial on several occasions in relation to the prosecution's admission of 404(b) evidence in its case-in-chief. A number of these objections at the status conference and during the trial included reference to the Michigan Rules of Evidence, the First Amendment and the Fourteenth Amendment. (TT III, Avant, 530 – objection based on "constitutional right to advocate on public issues"); (TT III, Moon, 576-576 & 578 – objection and request for jury instruction based on

constitutional protection of public views; at 578 – "goes way beyond any possible relevance"); (TT III, Hightower, objection under MRE 401 and MRE 403 as to whether Pinkney wrote Hightower's boss); (Status Conf of 10-20-14, at 8 – adds objections to "other acts" based on MRE 401 and MRE 403); (Status Conf of 10-20-14, at 17 – objection based on constitutional rights); (Status Conf of 10-20-14, at 20 – undue prejudice because jury may not like Pinkney's stances on issues)

Standard of Review for "Other Acts" Evidence That was the Subject of the Prosecutor's Pre-trial Notice

With regard to the admission of evidence, preliminary questions of law are reviewed *de novo*. Discretionary evidentiary rulings are reviewed under the abuse of discretion standard. This distinction was clearly set forth in *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.* In determining whether there was a legally proper purpose for admission of 404(b) evidence, this Court recently reiterated that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Rock v Crocker,* slip op pg 5 (Mich SCt # 150719) quoting *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004); see also, *United States v Gessa,* 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc) (whether there was a proper purpose, such as intent, preparation or plan, under FRE 404(b) is "a legal determination"). This Court has "stress[ed] that the relationship between the proffered MRE 404(b) evidence and the ultimate fact sought to be proven must be 'closely scrutinized.'" *People v Layher,* 464 Mich 756, 774 n 9; 631 NW2d 281 (2001) (citations omitted). Under 404(b), "the balancing of the probative value of the other acts evidence against its prejudicial effect" is the only component that is reviewed for an abuse of discretion. *United States v Fountain,* 2 F 3d 656, 667 (6th Cir 1993) quoting and

citing *Gessa* at 1261-1262.

Standard of Review for "Other Acts" Evidence for Which the Prosecution Provided No Notice Under MRE 404(b)(2)

With regard to the aforementioned evidence solicited on cross-examination of Pinkney, the prosecution filed no notice under MRE 404(b)(2) that it intended to present this evidence. While there is no published authority on point, the prosecution was required to provide notice under MRE 404(b)(2) that it would inquire into these activities on cross-examination. *People v Janiskee,* Mich COA # 306754, slip op pg 3 (10-25-12) (attached).

"[T]he essential value and underlying aims of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record." *People v Hawkins,* 245 Mich App 439, 454-455; 628 NW2d 105 (2001) interpreting *People v Sabin (After Remand),* 463 Mich 43; 614 NW2d 888 (2000).

When the prosecution fails to give proper notice under MRE 404(b)(2) prior to the admission of the evidence, it may be plain error if, had the notice been given, defense counsel would have objected or been able to prepare to take different actions. *Hawkins,* 245 Mich App at 455-456; see also, *People v Ullah,* 216 Mich App 669, 673-676; 550 NW2d 568 (1996) (error regarding its admission requires reversal if the prosecutor ultimately cites an improper purpose, the evidence is not relevant to an element of the offense and the jury may have given improper prejudicial weight to the evidence). Whatever test applies in relation to the lack of notice, it must consider the purpose for the requirement of notice. *Hawkins,* 245 Mich App at 455 ("this case

does not invoke the Supreme Court's concern that, without notice, the prosecutor was able to use irrelevant, inadmissible prior bad acts evidence to secure Hawkins' conviction.").

Even without the proper notice, Pinkney's counsel requested to approach the bench and objected on constitutional grounds and state law grounds during the cross-examination of Pinkney after some of the questions had been asked and answered. (TT VI, Pinkney, 1613-1615 & 1620-25) Defense counsel did this without making the objections in front of the jury because he knew the court "did not want a speech about it" and wanted to make the objection to the court outside of the hearing of the jury. However, the trial court would not "listen to a speech now" at the bench. The trial court required defense counsel, during this cross-examination, to make the objections in front of the jury "without speechifying." (TT VI, Pinkney, 1613-1614)

Standard of Review for Constitutional Issues

Preserved constitutional issues of law are reviewed *de novo.* E.g., *People v Grant,* 470 Mich 477, 484; 684 NW 2d 686 (2004) citing *Tolksdorf v Griffith,* 464 Mich 1, 5; 626 NW2d 163 (2001). Counsel preserved the objections on constitutional grounds in his response to the prosecution's notice under 404(b)(2) and at various points during the trial. As indicated in more detail below, the constitutional grounds are also preserved due to the fact that the trial court specifically indicated it would not allow objections to "other acts" evidence based on constitutional grounds.

The trial court precluded Pinkney's counsel from objecting on constitutional grounds on the first day of testimony as follows. The court indicated that it did not want Pinkney's counsel to object on constitutional grounds while in the presence of the jury. The trial court indicated this was only an emotional appeal and not proper grounds for objection. (TT III, Bench Conf, 577-578) (at pg 577, after objection based on free speech and association concerns related to

evidence of Pinkney's political activity, the trial court asked counsel to approach the bench and stated, among other things: "What I am asking you not to do is use words like (indiscernible) and using constitutional rights and using things like that . . .") (at pg 578, "There are ways to say that without using that rhetoric which clearly plays with emotions. And it's improper, it's not legalese. It is not even close.") Due to the court's restrictions on the ability to object on constitutional grounds, errors on these grounds are also preserved regardless of whether there was an objection and independent of the violation of MRE 404(b)(2). *People v Wilkins,* 184 Mich App 443, 450-451; 459 NW2d 57 (1990) (the trial court "refus[ed] to allow defense counsel an opportunity to make an offer of proof as to the excluded testimony."); *Alpha Capital Mgmt v Rentenbach,* 287 Mich App 589, 619; 792 NW2d 344 (2010) (abuse of discretion to prevent party from fully exercising right to make offer of proof) and *Barksdale v Bert's Marketplace,* 289 Mich App 652, 657; 797 NW2d 700 (2010) (same).

Argument

The prosecution utilized Pinkney's completely legitimate political and community activity based on the claim that because he is so involved with many political and community matters – including those far removed from the Hightower recall effort – he also was willing to commit illegal acts to promote his position in this recall. Under the Michigan Rules of Evidence and the constitution, there was no proper basis in this case to admit this evidence.

A. The Violation of the Michigan Rules of Evidence.

A four-prong test for admission of evidence under MRE 404(b) was articulated in *People v VanderVliet,* 444 Mich 52, 55; 508 N.W.2d 114 (1993):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair

> prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

"[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *Knox,* 469 Mich at 509 citing *Crawford, supra,* 458 Mich 376. "Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Knox,* 469 Mich at 510. The "proponent of evidence bears the burden of establishing relevance and admissibility." *Crawford,* 458 Mich at n 6.

Crawford explained the following in relation to a prosecutor's mere proffer of evidence, that only recites a proper reason in a mechanical or conclusory fashion, but does not explain the actual relevance of the 404(b) evidence to a fact at issue.

> a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been "offered" for one of the rule's enumerated proper purposes. Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. [*Crawford,* 458 Mich at 387]

"Rule 404(b) does not authorize automatic admission, and the proponent of the evidence must demonstrate its relevance." 2 Weinstein, Federal Evidence, § 404.20[3], pp 404-41 to 404-42." *Crawford,* 458 Mich at 388 n 7. "Relevance is not an inherent characteristic, *Huddleston,* supra at 689, nor are prior bad acts intrinsically relevant to 'motive, opportunity, intent, preparation, plan,' etc. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford,* 458 Mich at 387 citing *Huddleston v United States,* 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988)

(other citation omitted).

"The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *Crawford,* 458 Mich at 388. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id.* If the jury is improperly allowed to consider "other acts" evidence that is admitted for an improper purpose, no jury instruction can cure this error.[3]

In its second-amended notice, the prosecution identified motive as the basis for admitting Pinkney's political and community activities that occurred both prior to and after the events which are the basis of this prosecution. However, the prosecution did not (and could not, in any legitimate manner) provide this notice of motive with regard to the cross-examination of Pinkney. There was no proper relevance for nearly all of this evidence – including that for which notice was given – as required by *Crawford* and MRE 404(b).

"'A motive is the inducement for doing some act; it gives birth to a purpose.'" *People v Sabin,* 463 Mich 43, 68-69; 614 NW2d 888 (2000) quoting *People v Kuhn,* 232 Mich 310, 312; 205 NW 188 (1925). Reverend Pinkney's speaking around the country and at various events, his political activity and his community activities were not a proper basis for finding a motive except

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[3] Jury instructions that have protected defendants against improperly admitted "other acts" evidence must involve striking the evidence and telling the jury to disregard it or telling the jury that the evidence may not be considered for purposes of determining whether the defendant is guilty. *People v Carter,* 415 Mich 558, 600-601; 330 NW2d 314 (1982) (jury told not to consider evidence for purposes of determining whether the defendant was guilty) citing *Richardson, infra,* and *Page, infra,* and overruled on on other grounds by *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984); *People v Richardson,* 239 Mich 695, 698-699; 214 NW 965 (1927) (struck evidence and told jury to disregard it); *People v Page,* 198 Mich 524, 538-539; 165 NW 755 (1917) (evidence of "other acts" was stricken and jury was told to completely disregard it); *People v Guenther,* 188 Mich. App. 174, 187; 469 N.W.2d 59 (1991) (vague reference to inadmissible "other act" was stricken and jury told to disregard it). When the jury is allowed to consider the evidence for an improper purpose under MRE 404(b) (i.e., the evidence is not effectively stricken), no jury instructions can cure this error.

on the basis of the following prohibited inference – because Pinkney was involved in these activities **before and after** the events herein and had **a propensity to be politically active and active in the community in a legal manner,** his propensity went a step further and also included a propensity to **illegally** change the dates on petitions and allow voters to sign the petitions twice.

This use of this evidence was clearly improper. The Michigan Rules of Evidence prohibit the use of a defendant's associational activity or group membership for the purpose of showing that the defendant was likely to have committed a specific crime because the crime was in conformity with his associational activity or membership in the group. *See, People v Bynum,* 496 Mich 610; 852 NW 2d 570 (2014) (analyzing matter under MRE 402, 404(a) and 702, this Court held "an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang.").

Also, this Court's decision in *Sabin, supra,* indicates why the evidence was not admissible based on the prosecution's claim of motive – and that it actually involves prohibited propensity evidence. In *Sabin*, the Michigan Supreme Court rejected the theory that because the defendant had molested girls in his family in the past, he had a motive to molest girls in his family again. In rejecting this theory, *Sabin*, 463 Mich at 68, indicated that the prosecution was actually offering propensity evidence that is prohibited under MRE 404(b) (emphasis added):

> In this case, the prosecution argues that defendant's **motive** was to have sex with young girls who were related to him and that the existence of this motive, as evidenced by other sexual misconduct with his stepdaughter, tended to prove that the sexual assault alleged by the complainant actually occurred. This proffered purpose is undistinguishable from the so-called "lustful disposition" rule. However, as stated, this Court has never adopted that rule, and we decline to do so here. **To accept the prosecutor's theory of logical relevance would allow use of the evidence for the prohibited purpose of proving defendant's character to show that he acted in conformity therewith** during the events underlying the

charged offense.

In the case at bar, beyond the direct efforts to recall Hightower, the only thing that the proffered evidence of "other acts" established is that Reverend Pinkney has a propensity to engage in legal speech, legal political activities and legal community activities. These activities did not show a motive to commit illegal acts. The evidence was inadmissible under MRE 404(b) to attempt to establish a motive to alter recall petitions or allow people to sign petitions twice.

Also, the evidence was inadmissible under the third prong of the *VanderVliet* test, 444 Mich at 55 (that the probative value of the evidence is not substantially outweighed by unfair prejudice."). Pinkney's political and social views are strongly opposed by a good number of people within the community. The fact that this is true is evident based on the nature of some of those activities – criticizing local institutions, politicians, judges and a local corporation (Whirlpool), sometimes in a very harsh manner (for example, claiming judges are committing crimes against humanity, see, *supra, pg. 13*). Admitting evidence of activities that occurred both **before and after** the events charged herein – along with matters completely unrelated to the recall of Hightower and which are unpopular with many, presented the danger that some jurors would be biased against him due to their disagreement with his viewpoints. Even if the evidence was somehow relevant, this danger greatly outweighed any possible relevance this evidence may have had.

Also, the court must be strict in its analysis regarding whether the third prong of the *VanderVliet* test was violated due to the constitutional status of Pinkney's political and community activity. See subsection B of this argument, *infra*. "'The right of an American citizen to criticize public officials and policies and to advocate peacefully for change is the central meaning of the First Amendment.'" *Lucas v Monroe County,* 203 F3d 964, 973 (6th Cir 2000)

quoting *Glasson v City of Louisville,* 518 F2d 899, 904 (6th Cir 1975) and *New York Times Co. v. Sullivan,* 376 US 254, 273; 84 S Ct 710; 11 L Ed 2d 686 (1964); see also, *Chappel v Montgomery County Fire Protection,* 131 F3d 564, 576 (6th Cir 1997).

Presentation of Pinkney's protected activities and views had the potential for improper prejudice. Beyond Hightower, Pinkney campaigned against and opposed certain government officials and Whirlpool – persons and an entity who are popular with many people in the community. He also takes other social and political positions that alienate many people in the community. This obviously involves criticism and expression of viewpoints that are protected by our constitution, but which might be a basis to inflame some of the jurors.

The jury should not have been presented with these legitimate positions and activities of Pinkney when it had this potential for prejudice – and due to the lack of a proper purpose for admission. See, *Crawford,* 458 Mich at 383-384 ("Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged."). In Michigan's "system of jurisprudence, we try cases, rather than persons." *People v Allen,* 429 Mich 558, 566; 420 NW2d 499 (1988).

B. The First Amendment and MRE 403 were Violated.

The Court has "emphasized that 'the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment,'" *Wisconsin v. Mitchell,* 508 US 476, 486; 113 S Ct 2194; 124 L Ed 2d 436 (1993). However, "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government." *Haupt v United States,* 330 US 631, 642; 67 S

Ct 874; 91 L Ed 1145 (1947) (involving statements that concerned "sympathy with Hitler and hostility to the United States.").

The government violates a defendant's First Amendment rights to association and speech when it introduces evidence that is not relevant to the issues to be decided in the proceedings, especially when that evidence has the potential to be unfairly prejudicial. *Dawson v Delaware,* 503 US 159, 160; 112 S Ct 1093; 117 L Ed2d 309 (1992) (government violated the defendant's First Amendment right to association when it introduced evidence in a capital sentencing proceeding that he was a member of the Aryan Brotherhood, when "the evidence ha[d] no relevance to the issues being decided in the proceeding."). "Where a specific guarantee of the Bill of Rights such as the First Amendment is involved, courts must take 'special care' to assure itself that the [trial] court's alleged evidentiary error did not impermissibly infringe such guarantee as interpreted by the Supreme Court." *Blackmon v Booker,* 696 F3d 536, 555 (6th Cir 2012) (involving gang affiliation) (citation omitted).

The First Amendment also requires the court to "scrutinize with care"and "take special care" to insure First Amendment rights are not violated even if there is arguably some slight relevance in the case. This is particularly true with speech and activity that is at the core of the First Amendment. *New York Times v Sullivan,* 376 US 254;84 S Ct 710; 11 L Ed 2d 686 (1964) (at the core of First Amendment protection is political speech while obscenity and defamation are at the periphery); *Chaplinsky v New Hampshire,* 315 US 568; 62 S Ct 766, 86 L Ed 1031 (1942) ("high-value" speech, such as political speech has more constitutional protection than "low-value" speech, such as obscenity, commercial advertising, and false statement of fact).

Even First Amendment associational rights involved with gang membership receive a significant amount of protection in terms of whether it is admissible against a criminal defendant.

Dawson, supra; *United States v Irvin,* 87 F3d 860, 865 (7th Cir 1996); *United States v Roark,* 924 F2d 1426, 1434 (8th Cir 1991) citing *Michelson v United States,* 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948); *United States v Jernigan,* 341 F3d 1273, 1285 (11th Cir 2003). This is consistent with the Michigan Supreme Court's approach in *Bynum,* 496 Mich 610 (under MRE 402, 404(a) and 702, the court held "an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang.").

Given that political activity and speech are at the core of First Amendment values, this principle must be applied with even more vigor in the case at bar. Admission of the "other acts" evidence violated Pinkney's First Amendment rights.

Even if there was some relevancy in relation to some of this First Amendment activity, MRE 403 renders this evidence admissible. Any relevance was substantially outweighed by improper prejudice under the third prong of the *VanderVliet* test*,* 444 Mich at 55.

C. Due Process Violation.

Along with violating MRE 404(b) and the First Amendment, the admission of "other acts" evidence herein violated Due Process. *Manning v Rose,* 507 F2d 889, 894-895 (6th Cir 1974) (violation of Due Process if "other acts" evidence is tenuous in proving motive or another proper purpose; there must be a rational connection to the charged crime); *McKinney v Rees,* 993 F2d 1378, 1384 (9th Cir 1993) (admission of "other acts" evidence violates Due Process even when those acts might have some relevance in the form of propensity, but also have too strong of a tendency for improper prejudice and the evidence is "emotionally charged.").

The danger presented by the "other acts" evidence in this case – that Pinkney may have

been convicted based on his propensity to engage in activities, that are unpopular with some people, rather than based on sufficient evidence to prove he committed the charged crimes – has been long denounced by the U.S. Supreme Court which has indicated this position is based, in part, on the constitution. *Boyd v United States,* 142 US 450, 458; 12 S Ct 292; 35 L Ed 1077 (1892) (in reversing conviction due to improper admission of "other acts" evidence, the Court stated: "Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community . . .."); *Brinegar v United States,* 338 US 160, 174; 69 S Ct 1302; 93 L Ed 1879 (1949) (indicating inadmissibility of prior bad act involved "historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property" and which are based on common law and the constitution); *Michelson v United States,* 335 US 469, 475; 69 S Ct 213; 93 L Ed 168 (1948) ("courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt….").

Under any test, there was a Due Process violation as the "other acts" evidence regarding matters not directly related to the recall of Hightower had no relevance to the issues at hand and could have been sparked an emotional reaction from jurors.

IV. Ineffective Assistance of Trial Counsel for Failure to Object to the Aiding and Abetting Instruction.

Preservation of Issues: While the Court of Appeals reached the underlying merits of the issue, Pinkney requests a remand for an evidentiary hearing if the Michigan Supreme Court

determines it cannot reach the underlying issues based on trial counsel's lack of objection. In nearly all cases of allegations of ineffective assistance of trial counsel, an evidentiary trial court record is necessary to "exclude[] hypotheses consistent with the view that [the defendant's] trial counsel represented him adequately." *People v Ginther,* 390 Mich 436, 442-443; 212 N.W.2d 922 (1973) quoting *People v Jelks,* 33 Mich App 425, 431; 190 NW2d 291 (1971); accord, *People v Montague,* 431 Mich 898; 431 NW2d 832 (1988).

Standard of Review: The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact that are reviewed *de novo. Strickland v Washington,* 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v. Pickens,* 446 Mich 298, 359; 521 NW2d 797 (1994).

Argument: Trial counsel's actions in relation to the aiding and abetting issue were erroneous in that counsel failed to object to instructing the jury on the aiding and abetting issue when case law clearly indicates this instruction should not have been given to the jury, Argument II, *supra.* Counsel should have been aware of this matter based on: (a) the case law set forth in Argument II; and (b) when the trial court ruled on Pinkney's motion for a directed verdict at the close of the prosecutor's case-in-chief, the trial court did not specify that it found sufficient evidence that Pinkney was an aider and abetter, but ruled there was sufficient evidence that Pinkney committed the forgery. (TT VI, Motion for Directed Verdict, 1493) (finding "sufficient circumstantial evidence to – to support that Pinkney is the who (sic) changed the documents")

A defendant establishes ineffective assistance of counsel by showing show: (a) counsel's performance fell below an objective standard of reasonableness; and (b) that this representation resulted in prejudice to the defendant. *Pickens,* 446 Mich at 302-303; *Strickland,* 466 US 668.

The failure to object to the aiding and abetting instruction was inconsistent with the

standard for performance of counsel under the first-prong of *Strickland.* E.g., *People v. Ullah,* 216 Mich App 669, 685-686; 550 NW 2d 568 (1996) (failure to object to evidence and request instruction); *Everett v Beard,* 290 F3d 500, 514-516 (3rd Cir 2002) (failure to object to jury instruction regarding accomplice liability and listing cases from several circuits regarding failure to object to jury instructions); *Gray v Lynn,* 6 F3d 265, 269-270 (5th Cir 1993) (failure to object to jury instruction); *People v. Ullah,* 216 Mich App 669, 685-686; 550 NW 2d 568 (1996) (failure to object to evidence and request instruction).

Under the second prong of *Strickland,* prejudice resulted by the fact that there is a "reasonable probability" that the proceedings would have been different and Pinkney would have been acquitted if counsel would have objected to the trial court giving the jury an instruction on aiding and abetting. This ineffectiveness overcomes the procedural default involved with not preserving an issue for review. *Ege v Yukins,* 485 F3d 364, 378 (6th Cir 2007) citing *Edwards v Carpenter,* 529 US 446, 451; 120 S Ct 1587; 146 L Ed 2d 518 (2000); *People v Kimble,* 470 Mich 305, 313-314; 684 NW2d 669 (2004) ("'Good cause' can be established by proving ineffective assistance of counsel. *People v Reed,* 449 Mich 375, 378; 535 NW2d 496 (1995).").

V. No Crime Was Charged Under MCL 168.937 as it Only Provides the Penalty for Forgeries Prohibited Elsewhere in the Election Code.

Standard of Review: These issues involve the constitution and statutory construction. Both are reviewed *de novo*. *Grant, supra,* 470 Mich at 484 (preserved constitutional issues); *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW 2d 151 (2003) (statutory construction).

Preservation of Argument: Pinkney raised the argument that MCL 168.937 is only a penalty provision and related Due Process arguments in the trial court at various points.[4] He also

[4] Pinkney raised the issues in the trial court in: (a) a Motion to Quash and a Revised Motion to Quash filed in June of 2014; (b) a written Motion for Directed Verdict, 12-10-14, see

addressed these arguments in his opening brief on appeal and in a supplemental brief which the Court of Appeals granted leave for Pinkney to file after this Court's decision in *People v. Brandon Hall* (Mich SCt # 150677, 6-29-16). The National Lawyers Guild also addressed these arguments in an *amicus curiae* brief filed by leave of the Court of Appeals.

All of the arguments in the following subsections of this application were presented to the Court of Appeals. However, the Court of Appeals opinion did not address the following issues – which are very important – and are presented in more detail below:

> (a) identical language must be construed in an identical manner in four (4) statutes, including MCL 168.937, that are adjacent to each other. MCL 168.934 to MCL 168.937 contain the following exact same language in relation to the penalties for misdemeanors (MCL 168.934), felonies (MCL 168.935), perjury (MCL 168.936) and forgery (MCL 168.937):
>
> > "Any person found guilty of [insert crime category] under the provisions of this act shall, unless herein otherwise provided, be punished . . ..";
>
> and
>
> (b) MCL 168.759(8) which proscribes forgery of absentee ballots, was enacted by the legislature 40 years after the effective date of MCL 168.937 and, along with language proscribing forgery under MCL 168.932(c), is rendered surplusage if MCL 168.937 is deemed to proscribe forgery of any and all election-related documents. The Court of Appeals opinion does not mention MCL 168.759(8) or this issue anywhere in its opinion.

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paragraph 6; see also, paragraph 7; and (c) Motions for Directed Verdict at the close of the government's case and at the close of all of the evidence (incorporating a supporting memorandum). (TT VI, 1485-1486; TT VII, 1785-1787).

However, Pinkney was not required to take any particular action to preserve issues that entitle him to a directed verdict. E.g., *Wolfe,* 440 Mich at 516, n 6; see also, cases cited *supra, pg 13.* Moreover, the failure to charge a substantive offense is a jurisdictional issue that maybe raised at any time. *People v Alvin Johnson,* 396 Mich 424, 440 & 444 n 18; 240 NW2d 729 (1976); *In re Coy,* 127 US 731; 758 8 S Ct 1263; 32 L Ed 274 (1888) (when face of the charging document does not state an offense, there is no jurisdiction) (citation omitted).

A. The Question Presented Herein Was Not Decided in This Court's Opinion in *Hall.*

In *Hall,* at slip op pg 2, n 2[5], this Court specifically held that it was not addressing the question that Pinkney presents herein – whether MCL 168.937 is only a penalty provision that does not substantively proscribe forgery. This was due to Hall's failure to properly present this argument in the Michigan Supreme Court – even though he did so in the Court of Appeals.

Because this issue was not raised and briefed before the Michigan Supreme Court in *Hall*, this Court's opinion is not precedential in relation to this issue. "Questions which 'merely lurk in the record,' *Webster v. Fall,* 266 US 507, 511 (1925), are not resolved, and no resolution of them may be inferred." *Illinois State Board of Elections v Socialist Workers Party,* 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979). This principle has long been recognized in American jurisprudence and in Michigan case law. *People v Jory,* 443 Mich 403, 414 n 8; 505 NW2d 228 (1993) ("The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent.") quoting *Breckon v Franklin Fuel Co,* 383 Mich 251, 267; 174 NW2d 836 (1970) in turn quoting *Cohens v Virginia,* 19 U.S. (6 Wheat) 264, 399; 5 L Ed 257 (1821); *Currie v Fiting,* 375 Mich 440; 134 NW2d 611 (1965) quoting *Larzelere v. Starkweather,* 38 Mich 96, 101 (1878) and *Cohens,* supra. "No logical extensions . . . are permitted" when the procedural context of the prior opinion circumscribes the issues addressed in the prior opinion. *Weeren v Evening News Asso,* 379 Mich 475, 503; 152 NW2d

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[5] Footnote 2 (emphasis added) states, in pertinent part:

> Although the defendant argued in the Court of Appeals that MCL 168.937 does not create a substantive offense, he did not appeal this holding or otherwise pursue this argument, and the parties did not otherwise ask us to review it. **We therefore decline to reach this question.**

676 (1967) citing *Larzelere,* supra and *Cohen*, supra (other citations omitted).

B. The Election Code as it Existed When MCL 168.937 Went Into Effect in 1955 Supports Pinkney's Argument. A Later Amendment Also Supports Pinkney's Argument.

The plain language and structure of the 1954 Public Act which created MCL 168.937 supports the argument that the legislature intended MCL 168.937 to be a penalty provision and that MCL 168.932(c), which was also created by same 1954 Public Act, substantively proscribed forgery of some, but not all, election code documents.

A later amendment to the election code resulted in MCL 168.759(8) which added absentee ballots to the types of election-code documents that could be the basis of a felony prosecution for forgery – with MCL 168.937 providing the penalty for a violation of MCL 168.759(8). The addition of MCL 168.759(8) is surplusage if MCL 168.937 had already substantively prohibited forgery of any and all election code documents.

i. Public Acts 1954, No. 116, Created MCL 168.937 and Three (3) Other Penalty Provisions that Contain Identical Language.

Public Acts 1954, No. 116, effective June 1, 1955, established four (4) penalty provisions, including MCL 168.937.[6] The other penalty statutes – which immediately proceed MCL 168.937 – relate to perjury (MCL 168.936), felonies in general (MCL 168.935) and misdemeanors (MCL 168.934). These three (3) other penalty provisions contain the same following language that is set forth in MCL 168.937: "Any person found guilty of [insert crime category] under the provisions of this act shall, unless herein otherwise provided, be punished . . .." All four (4) of these statutes then follow this language with the applicable penalties. None of these four (4) statutes have been amended since they went into effect on June 1, 1955.

[6] The relevant pages from Public Acts 1954, No. 116 are attached as Appendix C.

ii. Identical Language in Statutes Should Receive Identical Construction – Consistent with the Plain Language in Each Statute.

None of these four (4) penalty provisions, MCL 168.934 to MCL 168.937, can be deemed to create substantive offenses. First, the penalty statutes for misdemeanors and felonies in general reference no particular type of crime. For instance, MCL 168.935 just states: "Any person who shall be found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished" as indicated in the statute. You can delete "felony" from this quoted text and replace it with "forgery," "perjury" or "misdemeanor" to arrive at the exact language for each of the other statutes. The available fines and imprisonment for each statute then follow this text.

This identical language in each statute must be construed in an identical manner. "'Identical language should certainly receive identical construction when found in the same act.' *People ex rel Simmons v Munising Twp,* 213 Mich 629, 633; 182 NW 118 (1921)." *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 155-156; 545 NW2d 642 (1996); *accord, People v Parks,* 483 Mich 1040, 1061; 766 NW2d 650 (2009) citing *Munising Twp, supra*; see also, *People v Bonilla-Machado,* 489 Mich 412, 436-438; 803 NW2d 217 (2011) (Markman, concurring) (citations omitted).

The plain language of each of these statutes, as it existed in 1955 and as it currently exists, only involves the penalty when a felony, misdemeanor, perjury or forgery is committed "under the provisions of this act." The language does not create substantive offenses in relation to any common law felony, misdemeanor, perjury or forgery in relation to any aspect of the election code. However, in relation to MCL 168.937, the Court of Appeals found otherwise due to what it believed was a correct policy to ensure the purity of the election process and because of

what it claims to be an "absurd result." *Pinkney,* slip op pg 6, first full paragraph.

The judiciary may not go beyond the plain language of each statute and make an exception to the plain language because it believes a proper purpose is best achieved by expanding the language or because it labels a result "absurd" when the legislature could have intended the result of the plain language. *Mich Educ Ass'n v Sec'y of State,* 489 Mich 194, 223-224; 801 NW2d 35 (2011).

Here, the "absurd result" is supposedly limiting forgery prosecutions to the documents listed in MCL 168.932(c) and MCL 168.759(8). However, the legislature could have easily thought these were appropriate limitations. MCL 168.932(c) limits forgery prosecutions to persons who have heightened responsibilities in relation to elections or elections documents ("[a]n inspector of election, clerk, or other officer or person having custody of" the records listed in the statute). MCL 168.759(8) expanded forgery prosecutions to persons who forge an absentee ballot. Also, see sub-arguments iii & v, *infra, pp. 46-47 & 48-49.* The legislature could have fully recognized the "chill" on electoral rights of citizens who are not employed by the government if forgery prosecutions were to include prosecution, as a 5-year felony, of any citizen in relation to forgery of any and all election-related documents. It is absolutely clear that the legislature could consider this "chilling issue" as important. See, *Williams v Rhodes,* 393 US 23, 31; 89 SCt 5; 21 LEd2d 24 (1968) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.") (footnote omitted) quoting *Wesberry v Sanders,* 376 US 1, 17; 84 S Ct 526, 11 L Ed 2d 481 (1964); see also, *Wilkins v Ann Arbor City Clerk,* 385 Mich 670, 680-81; 189 NW2d 423 (1971) ("It can be stated without exaggeration that the right to vote is one of the most precious, if not the

most precious, of all our constitutional rights.").

This issue also involves important separation of powers principles under the Michigan Constitution. "Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of" the judiciary. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 582; 702 NW2d (2005). Any such judicial revision or amendment of plain language involves a court "impermissibly legislat[ing] from the bench." *Devillers,* 473 Mich at 582. The judiciary must function within its "constitutional responsibility . . . to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power." *Devillers,* 473 Mich at 583 (footnote omitted) quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608, 637; 684 NW2d 800 (2004).

Finally, if the legislature wishes to provide that forgery of additional election-code documents can be prosecuted, it should provide for this with plain language in a statute. *People v Underwood*, 278 Mich App 334, 339; 750 NW 2d 612 (2008). This is the role of the legislature and not the role of the courts.

iii. The 1954 Public Act Also Created MCL 168.932(c) Which Proscribes Forgery of Limited Categories of Election-Code Documents.

Public Acts 1954, No. 116 also created at least one statute that affirmatively proscribed forgery of certain documents by certain persons, MCL 168.932(c). The language contained in MCL 168.932(c) set forth the same elements as the common law definition of forgery that had been established long before 1954. The current version of MCL 168.932 (emphasis added), which has not changed in substance since it went into effect in 1955, states:

(c) An inspector of election, clerk, or other officer or person having custody of

> any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or **fraudulently make any entry, erasure, or alteration <u>on any or all of those items</u>,** or permit any other person to do so.

Hall set forth case law regarding the common law definition at slip op at pg 9 and n 31 which makes it clear that MCL 168.932(c) proscribes forgery. *Hall* at pg 9 ("The common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud.") quoting *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895) (footnote omitted); *Hall,* slip op at pg 9 n 31 (*"People v Susalla*, 392 Mich 387, 390; 220 NW2d 405 (1974) ('[F]orgery includes any act which fraudulently makes an instrument purport to be what it is not.') (citation and quotation marks omitted)."

Other case law, which Pinkney quoted at pg 46 of his opening brief in the Court of Appeals, also clearly states the common law definition of forgery. *People v Larson,* 225 Mich 355, 358-359; 196 NW 412 (1923) ("Forgery includes any act which fraudulently makes an instrument purport to be that which it is not. *People v Marion,* 29 Mich 35."); *People v Van Horn,* 127 Mich App 489, 490; 339 NW2d 475 (1983) ("Forgery is defined as making a false document described in the statute, with intent to deceive, in a manner which exposes another to loss. *People v Susalla,* 392 Mich 387, 393; 220 NW2d 405 (1974).").

iv. Consistent with the Legislature's Enactment of MCL 168.937(c) which Substantively Proscribed Forgeries, the Legislature Also Provided for Separate Statutes – Beyond the Penalty Statutes – to Substantively Proscribe Perjury, Other Felonies and Misdemeanors.

When the legislature proscribed forgery of certain documents as set forth in MCL 168.932(c) by Public Acts 1954, No 116, it also created other substantive provisions that

proscribed perjury, certain felonies and certain misdemeanors as follows – that were independent of the aforementioned penalty provisions related to those crimes as indicated by the following:

(a) at least one election-code statute that proscribes perjury of certain documents, MCL 168.933;

(b) a statute that lists numerous misdemeanor offenses, MCL 168.931; and

(c) subsections (a), (b) and (d) of MCL 168.932 which proscribe specific election-related felonies that did not involve either perjury or forgery.

Statutes "that relate to the same subject matter" must be construed in such a manner as to "produce a harmonious whole" and remain consistent. *Fradco, Inc v Dep't of Treasury,* 495 Mich 104, 115; 845 NW2d 81 (2014) (footnotes and citations omitted). The statutory language must be read "in pari materia" which requires the text to "be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book v Revenue Div,* 459 Mich 403, 416; 590 NW2d 293(1999) (citations omitted).

The structure of the election code must be read in a harmonious manner – with each of these penalty provisions applying only when one of the other sections of the election code proscribes forgery, perjury or other crime.

v. One (1) Other Section of the Election Code, Enacted after 1955, Also Proscribes Forgery. It Must Be Presumed the Legislature Knew of MCL 168.937 When it Enacted the New Statute.

MCL 168.759(8) indicates it is a felony to forge a signature on an absentee ballot application. This provision was added by Public Acts 1995, No. 261. It does not contain a penalty provision. Thus, the legislature decided to add to the types of forgery that are penalized under MCL 168.937.

It is presumed that the legislature had knowledge of MCL 168.937 when it added the

language proscribing forgery in subsection (8) of MCL 168.759. "[I]t is a well-established principle that the Legislature is presumed to be aware of all existing statutes when enacting new law. *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993)." *Nemeth v Abonmarche Development, Inc,* 457 Mich 16, 43; 501 NW2d 641 (1998). If the legislature deemed MCL 168.937 as providing for felony liability for forgery of any and all election-code documents, there would have been no need to add the provision in MCL 168.759(8).

vi. If MCL 168.937 is Deemed to Prohibit Forgeries of Any and All Documents Under the Election Code, MCL 168.932(c) and MCL 168.759(8) are Rendered Surplusage.

Any claim that MCL 168.937 creates substantive crimes based on the forgery of any and all election-related documents, by any person, renders other sections of the election code that prohibit forgery, such as MCL 168.932(c) and MCL 168.759(8), as surplusage – contrary to Michigan law. *E.g., State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002).

C. Due Process. the Vagueness Doctrine and the Rule of Lenity Require that the Statute Not Be Applied to Herein.

Due Process and the Rule of Lenity require that the courts construe any ambiguity – as to whether MCL 168.937 involves merely a penalty as opposed to substantively proscribing forgery of any and all election related documents – favorably to Pinkney. Similarly, Due Process requires any vagueness in relation to this statute must be resolved favorably to Pinkney.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v New Jersey,* 306 US 451, 453, 59 S Ct 618, 83 L Ed 888 (1939). The Due Process Clause of the Fourteenth Amendment requires that laws must provide sufficient guidelines to allow an ordinary person to determine whether the person's conduct is proscribed

by the law. **"The axiomatic requirement of due process** that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, *see Lanzetta v. New Jersey,* 306 US 451, 453; 83 L Ed 888; 59 S Ct 618 (1939) (citing *Connally v General Construction Co,* 269 US 385, 391; 70 L Ed 322; 46 S Ct 126 (1926)), carries the **practical consequence** that a defendant charged under a valid statute will be **in a position to understand with some specificity the legal basis of the charge against him."** *Schad v Arizona,* 501 US 624, 632-33; 111 S Ct 2491; 115 L Ed 2d 555 (1991); *accord, People v Lino,* 447 Mich 567, 575 n 2 & 575-576; 527 NW2d 434 (1994); *Kolender v Lawson,* 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983) (setting forth constitutional requirements under the vagueness doctrine) (citations omitted).

Michigan also construes criminal statutes strictly in favor of defendants under the rule of lenity. *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982); *People v Rutledge*, 250 Mich App 1, 5; 645 NW2d 333 (2002). This rule of statutory construction is required by Due Process. *Dunn v United States,* 442 US 100, 112-113; 99 S Ct 2190; 60 L Ed2d 743 (1979) (citations omitted) (the rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); *United States v Lanier,* 520 US 259, 265-266; 117 S Ct 1219; 137 L Ed 2d 432 (1997) (rule of lenity is based on the same constitutional issues as the vagueness doctrine).

WHEREFORE, Defendant Pinkney prays that this court reverse his convictions.

Respectfully submitted,

Date: September 3, 2016

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Certificate of Service

I hereby certify that I am counsel for a party and that on September 3, 2016 I filed the foregoing document through the TrueFiling electronic filing system, and that the foregoing document was served upon all counsel of record through the electronic filing system.

Date: September 3, 2016

/s/ Timothy M. Holloway
Attorney for Appellant